No. 13010

United States

Court of Appeals

for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN, and ROY E. LARSON, as Trustees of that certain trust known as INLAND EMPIRE OIL AND GAS SYNDICATE, a common law trust,

APPELLANTS,

vs.

THE OHIO OIL COMPANY, a Corporation,

APPELLEE.

APPELLANTS' BRIEF

E. J. McCabe,
E. J. McCabe, Jr.
Attorneys for Appellants.

Appeal from the United States District Court for the District of Montana.

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JURISDICTION

This is an appeal from an adverse judgment of the United States District Court for the District of Montana, Great Falls Division, against the appellants (plaintiffs below) and in favor of the appellee, (defendant below) adjudging and decreeing the said appellants take nothing by the suit and that appellee recover its costs in the sum of $349.07 (R. 157,158). The action was orginally commenced in the District Court of the Ninth Judicial District of the State of Montana in and for the County of Pondera by the appellants, citizens and residents of Montana, against the appellee, to obtain a judgment requiring the appellee to account to appellants for alleged monies received and improperly withheld from appellants in connection with certain oil and gas agreements theretofore entered into between appellants and appellee and to pay the appellants the amount of money determined owing to them respectively on such accounting which it is alleged will exceed the sum of $175,000.00 due three of appellants as trustees of Inland Empire Oil and Gas Syndicate and will exceed the sum of $195,000.00 due to appellant Potlatch Oil and Refining Company (R. 4-25). The cause was duly removed by appellee to the United States District Court (R. 26-33) on the grounds the cause was a civil action involving a controversy wholly between citizens of different states, the plaintiff, Potlatch Oil and Refining Company, a Montana corporation,

being a resident and citizen of Montana, the other plaintiff being trustee of Inland Empire Oil and Gas Syndicate, a common law trust, being residents of Montana and Idaho, respectively, and defendant Ohio Oil Company being a citizen and resident of Ohio and the amount in controversy (Complaint, paras. I, II, IV, XVI, XVII, R. 4, 5, 15, 16 and R. 26-28) exceeds $3,000.00, exclusive of interest and costs.

The jurisdiction of the District Court of the United States is found in section 1332 Title 28 United States Codes Annotated, (Title 28 United States Code, section 41 (1). Judicial Code Section 24, as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states, where the amount in controversy exceeds $3,000.00, exclusive of interest and costs.

The appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit is found in section 1291 Title 28, United States Codes Annotated (first paragraph), (Title 28 United States Code, section 225), (Section 128 Judicial Code, as amended) wherein the Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the United States Supreme Court. No such direct appeal to the said Supreme Court is permissible in this case.

STATEMENT OF THE CASE

In referring herein to the parties to this cause, we shall adopt the following designations, respectively:

1. "Potlatch" for Potlatch Oil and Refining Company.

2. "Inland" for Inland Empire Oil and Gas Syndicate, the collective name under which the plaintiff trustees acted on behalf of their trust.

3. "Ohio" for the defendant The Ohio Oil Company; and

4. "Troy" for Troy-Sweetgrass Oil Syndicate, a common law trust.

5. "R.C.M." for the revised codes of Montana.

On June 15, 1922, upon solicitation by Ohio, Troy assigned to Ohio an undivided 55 percent interest in oil and gas leases embracing 1,520 acres of land, comprising five separate tracts, situate in Toole County, Montana, (Complaint's "Exhibit B" R. 23-26) and on the same day, as a part of the transaction, they entered into a written Operating Agreement for the development and operation of the lands for oil and gas purposes (Complaint's "Exhibit A" R. 17-25). These instruments were written up by Ohio and its attorney, A. M. Gee (Jones deposition R. 425 ll. 22-32, R. 426 ll. 1st to 12th, and Gee deposition R. 583, ll. 2nd to 30th, R. 584, ll. 1st to 13th, R. 554 ll. 15th to 29th, R. 555 ll. 1st to 18th).

The Operating Agreement gave Ohio the control

and management of the lands and leases and of the development and operation thereof for oil and gas purposes including the marketing of the oil and gas produced and Ohio entered into control and management of the lands and leases and thereafter had and maintained sole and exclusive control and management thereof for drilling, development, and operation, including the marketing of oil and gas produced and all equipment in connection therewith until and including January 31, 1943, when Ohio sold and conveyed all its interest to The Texas Company. (Complaint, Par. VI and VII, R. 8, 9, Answer, Par. III, R. 54).

January 1, 1923, Troy transferred and conveyed one half of its interest under the Operating Agreement and the pertinent lease to Inland in so far as same pertained to the "Baker Lease" on SW¼ of Section 3 and SE¼ of Section 4, Township 35 North, Range 3 West, M.M., notice thereof given to Ohio about June 2, 1923, who thereafter recognized Inland's rights therein (Complaint para. VIII, R. 10, Answer, Par IV, R. 54). August 18, 1923, Troy transferred and conveyed to Potlatch all of its remaining undivided interest in the Operating Agreement and leases (Complaint Para. IX, R. 10, Answer Para. V, R. 54). Troy transferred and conveyed the foregoing interests expressly subject to the rights of Ohio and Inland and Potlatch expressly agreed with Troy to perform and keep the terms and conditions of all

agreements and contracts transferred by Troy to them respectively. (Answer para V, R. 54, stipulation R. 98).

In the interim Ohio drilled a producing oil well on the lands embraced in the Sindon lease and one on the Baker lease and rendered monthly statements to Troy and later to Inland and Potlatch, setting forth charges and credits, purporting to pertain to operations of Ohio under the Operating Agreement and where a credit for a month was stated as due a check for such amount was mailed to plaintiffs and cashed and proceeds of check retained by plaintiffs, totaling $250,000.00 approximately. (Stipulation of facts. R. 99-102). Statements rendered have been filed as original documents in this court by order of the district court being exhibits "A", "B", "C" and "D" and vouchers accompanying checks transmitted to plaintiffs being exhibit "E" (R. 196-201). The officers and trustees of Troy, Inland, and Potlatch, respectively, made oral and written objections to certain charges and classes of charges appearing on monthly statements and being made by Ohio against their respective trusts and corporation, asserting that such charges were not properly to be chargeable against them under the Assignment and Operating Agreement and were contrary to the intent of the parties to the Assignment and Operating Agreement. (R. paras. XI, XII, pp. 12, 13, Jones deposition, R. 440-448, Wilson deposition, R. 516-519).

The evidence showing the objections to charges made will be discussed at length in subsequent divisions of this brief devoted to plaintiffs' argument and to avoid repetition, will not be repeated here. Ohio denied improper charges were being made by letters written Inland and Potlatch (R. 306-312, 336-340, 350-355, 65-89).

The plaintiffs assert that as a result of their making the objections and notice in 1926 to John McFadyen, (defendant's division manager in charge of the operations for defendant, R. 96, 97) of their intention given to bring suit against Ohio, Ohio requested that no suit be brought and promised upon a final accounting that any and all improper charges made would be corrected, and due credit would be given and, in reliance upon such promise, plaintiffs withheld suit until after they learned that Ohio, without any notice to appellants of its intention to so do, had sold, assigned, and conveyed to the Texas Company all of Ohio's rights and interests in the Operating Agreement and the lands affected thereby. (R. 446 ll. 28- 30, R. 447-449, R. 229, 230). Ohio failed to account and rectify the alleged improper charges notwithstanding demand to do so was made by appellants to and upon Ohio. (R. 233-238) (R. 369-372). Thereupon the present action was commended March 18, 1947. (R. 4-25). Evidence in detail pertinent to the foregoing facts will be referred to and discussed in appellants' argument of the facts and the law reserved for sub-

sequent divisions of this brief.

The appellee interposed a consolidated motion for severance of claims, to dismiss for lack of capacity to sue, to dismiss on grounds the action is barred by statutes of limitation. Revised Codes of Montana, 1935, to-wit: Secs. 9028 subd. 2, 9029, 9030, and 9031 subd. 3; for more definite statement and to strike certain portions of the complaint (R. 34-42). The motion was denied with right in appellee to renew motion or any appropriate subdivision thereof at the trial (R. 52).

Appellee answered (R. 53-95) admitting making of the Assignment of interest in leases by Troy and the subsequent entering into the Operating Agreement referred to in the complaint, (R. 53) denied any oral agreement prior to the writings restricting or limiting charges against Troy's share of production to cost of actual drilling of wells at their location on the lands, actual cost of equipment located on the lands and actual cost of installation of equipment and repairs and replacements thereof or any promise to incorporate same in an agreement, (R. 6, 7) (Answer par. ll. 53, 54); admitted defendant's possession and maintaining exclusive control and management of the lands and marketing oil and gas production therefrom and drilling of producing wells and until Ohio sold its interests to the Texas Company on January 31, 1943. (Complaint R. 6,7) (Answer R. 53,54). Answer further denied that assignment and operating agreement

was written and prepared by Ohio and its attorneys (R. 6,7) (R. 53, 54) and denied directing Troy's attention to the clause in paragraph 111 of Operating Agreement which reads "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands," as limiting expenses and chargeable against Troy and denied Ohio represented to Troy the purpose of the clause was to express the true intent to limit expenses chargeable to Troy and denied Troy relied thereon as aforesaid. (R. 7,8) (R. 53,54). The answer admitted transfer of Troy's interests to plaintiffs respectively, continued oil and gas productivity of the leased lands and the exclusive marketing of same by Ohio, denied making improper charges against plaintiffs and that asserted charge for overhead made was not improper (R. 11, 12, 13) (R. 55). Answer admitted certain complaints of improper charges had been made by Potlatch and Inland and meeting held to adjust and written communications with reference thereto in August and September, 1925, and that no other objections made by Potlatch or Inland until July 8, 1946, (R. 13, 14) (R. 55), and Ohio denied it purchased the oil produced at 10 to 20c a barrel below the prevailing market price at the wells (R. 13, 55). Ohio alleges statements showing actual expense of developing and operating the lands were furnished Inland and Potlatch and remitted amount to them when credit

shown and same were received and retained without objection by plaintiffs until July 1, 1946, and thereby an account was stated and settled by the monthly statements between the parties. (R. 13, 14, 57). The answer further denies that Ohio promised that the erroneous and improper charges complained of by plaintiffs would be rectified upon a correct, full, and final accounting to be rendered later to plaintiffs and denied that no full, final and correct accounting had been made or that plaintiffs by reason of charges made had been deprived by defendant from realizing the benefits under aforesaid assignment and operating agreement to which plaintiffs were entitled and denied that there will be found due on accounting sums exceeding $175,000.00 and $195,000.00 to Inland and Potlatch and further denies that plaintiffs had performed the terms and provisions and conditions of said "Operating Agreement" and "Assignment" (R. 14, 15, 58). The answer purports to plead defenses of laches, statutes of limitations and estoppel and account stated. (R. 58-65).

At the trial an order of the Court was duly made, with the express consent of all parties, that certain questions and issues be determined and a finding and decision on such questions and issues be made by the Court prior to adjudging any accounting to be had and which issues summarized, are (R. 128, 130) substantially.

(a) Is evidence of the character offered by the

depositions of T. P. Jones filed or any similar oral testimony from other witnesses admissible for the purpose of (a) modifying or explaining the terms of the Operating Agreement, copy of which is attached to plaintiffs' complaint herein and marked "Exhibit A", or (b) interpreting the same, and if the Court find such testimony admissible, that the Court further find what the actual agreement was between Troy and Ohio, and that the Court adjudge and declare the true and actual meaning of said Operating Agreement and what costs and expenses of developing and operating the lands involved for oil and gas purposes, as incurred by Ohio, could properly be charged in part to the extent of 45 percent thereof to Troy and successors in interest (R. 128-129);

(b) That the Court determine as an issue in the case the merits of the defendant's first affirmative defense pleading the defense of laches as a bar to the cause of action stated in plaintiffs' complaint (R. 129);

(c) That the Court determine as an issue in the case the merits of the defendant's second and third affirmative defenses wherein defendant pleads the five-year Statute of Limitations and the eight-year Statute of Limitations in its answer (R. 129);

(d) That the Court determine as an issue in the case the merits of defendant's fourth affirmative defense wherein it pleads that there was an account stated between the plaintiffs and defendant by

reason of monthly statements rendered plaintiffs by the defendant (R. 129, 130).

SPECIFICATIONS OF ERROR

1. The trial court erred in finding as facts that the pertinent portions of the agreement dated June 15, 1922, between plaintiffs' (appellants') predecessor in interest, Troy-Sweet Grass Oil Syndicate, and the Ohio Oil Company is plain and free from ambiguity and is clear, explicit and unequivocal in its language, terms and provisions that defendant, the Ohio Oil Company, at all times has fuily complied with each and all of the obligations therein imposed upon it, (R. 151 152) as the finding is contrary to the evidence.

2. The trial court erred in finding as facts that T. P. Jones was one of the persons who prepared the agreement of June 15, 1922, and was engaged directly or indirectly in the production and development of oil and gas leases and lands and was experienced in that business and knew or should have known and understood the meaning of the plain language used and contained in said agreement and that said agreement was entered into at arm's length, (R. 152) in so far as the finding purported to include T. P. Jones or other representatives of Troy when the agreement of June 15th, 1922 was negotiated and prepared because the finding is not supported by evidence.

3. The trial court erred in finding as facts that at no time during the period subsequent to Ohio en-

tering into possession of the property, and prior to the time that Troy assigned to Inland and Potlatch were any objections ever made by Troy to Ohio with reference to the accounting which included the same items as subsequent statements of account made to Inland and Potlatch contained, (R. 153) as same is contrary to the evidence.

4. The trial court erred in finding as facts that payments made by Ohio were received and accepted by plaintiffs (appellants) during all of said period well knowing that Ohio had repeatedly refused to make any changes in its charges such as plaintiffs (appellants) proposed and plaintiffs (appellants) knew or should have known that the payments were made by Ohio in full payment of the respective items covered in its respective monthly statements, (R. 153, 154) as same is contrary to the evidence.

5. The trial court erred in making and declaring as a conclusion of law that the agreement of June 15, 1922, between Troy and Ohio is clear and explicit does not involve an absurdity and that the agreement must be ascertained from the agreement alone and it may not be explained or interpreted by parol evidence or reference to matters ouside of and not recited in the written agreement, (R. 155) as same is contrary to the law.

6. The trial court erred in making and declaring as a conclusion of law that T. P. Jones' testimony as to the alleged remark of John McFadyen, deceased manager of Ohio, is not admissible for any

purpose that no foundation for such testimony has been made and no injustice will be done by excluding it and that no imperfection of the writing is put in issue. (R. 155) as same is contrary to law.

7. The trial court erred in making and declaring as a conclusion of law that Ohio through a continuous and unvarying course of conduct on its part under the plain requirements of the written agreement since the execution thereof and at all times thereafter during the period questioned in this suit in all things complied with the clear terms and provisions of the written agreement of June 15, 1922, (R. 155, 156) as same is contrary to the facts and the law.

8. The trial court erred in making and declaring as a conclusion of law that the statutes of limitation of the State of Montana bar plaintiffs (appellants) from any recovery in the action, R. 156) as same is contrary to the facts and the law.

9. The trial court erred in making and declaring as a conclusion of law that the statutes of limitation of the State of Montana bar plaintiffs (appellants) from any recovery in the action (R. 156) as same is contrary to the law and the facts.

10. The trial court erred in making and declaring as a conclusion of law that Ohio is not a trustee for plaintiffs (appellants), (R. 156) as same is contrary to the facts and the law.

11. The trial court erred in making and declaring as a conclusion of law that the monthly statements

of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the money paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and plaintiffs' (appellants) and may not be challenged by them (R. 156) as same is contrary to the facts and the law.

12. The trial court erred in making and declaring as a conclusion of law that plaintiffs (appellants)) recover nothing and that defendant do have judgment in its favor and recover from plaintiffs (appellants) the defendant's (respondent's) costs expended in the action, (R. 156) as the judgment rendered is contrary to the law and the evidence.

13. The trial court erred in rendering pudgment in favor of defendant (respondent) and against the plaintiffs (appellants) and adjudging recovery of defendant's (respondent's) costs from plaintiffs (appellants) in the action (R. 156) as the judgment rendered is contrary to the law and the evidence.

14. The trial court erred in disregarding the testimony of witness T. P. Jones concerning and relating to the circumstances under which the agreements were made between Troy and Ohio as to what was said and done by the representatives of the parties and the interpretation placed upon the agreement at the time of the making thereof (R. 413, 423-429, 430-433, 467-473) for the reason

such testimony was legally competent, relevant and material, and properly admissible as evidence in the case.

ARGUMENT

In considering the questions specified in the above mentioned order of the Court, (Ante P. 10-12) we shall direct our discussion to such questions in the sequence specified in the order.

(1) **Admissibility of testimony of T. P. Jones to explain (and) eliminate ambiguity and uncertainty in the assignment and Operating Agreement.**

At the threshold of inquiry as to whether the testimony of T. P. Jones is or is not admissible, we are confronted with the query whether ambiguity or uncertainty arose by reason of the prior verbal agreement pursuant to which the written assignment of the leases (R. 23-25) was executed and the terms of the Operating Agreement signed by the parties after the prior written assignment was given (R. 17-22), as to the intent of the parties thereto. If so, then the Jones' testimony relating to what was said and done prior to and at the time of the making of the assignment explanatory of the verbal terms of the prior agreement pursuant to which the assignment of leases was made and explanatory of any ambiguity or uncertainty arising from the language used in the written operating agreement, the surrounding circumstances and the situation of the parties is admissible to remove the ambiguity or uncertaintly unless the testimony is excluded by other

contrary evidentiary principles. The statutory rules of interpretation appear in Chap. 7 R.C.M. 1947, (Chap. 108. R.C.M. 1935), and include the following statutes:

"A contract must be so interpreted as **to give effect to the mutual intention of the parties as it existed at the time of contracting,** so far as same is ascertainable and lawful" (Emphasis supplied).

Sec. 13-702 R.C.M. 1947, Sec. 7527 R.C.M. 1935).

"For the purpose of ascertaining the intention of the parties to a contract, **if otherwise doubtful,** the rules given in this chapter are to be applied." (Emphasis supplied).

Sec. 13-703 R.C.M. 1947, Sec. 7528 R.C.M. 1935.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter."

Sec. 13-705 R.C.M. 1947, Sec. 7530 R.C.M. 1935.

"The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other."

Sec. 13-707 R.C.M. 1947, Sec. 7532 R.C.M. 1935.

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Sec. 13-713 R.C.M. 1947, Sec. 7538 R.C.M. 1935.

"For the proper construction of an instrument, the circumstances under which it was made including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Sec. 93-401-17 R.C.M. 1947, Sec. 10521 R.C.M. 1935.

"If the terms of a promise are in any respect ambiguous or uncertain, **it must be interpreted in the sense in which the promissor believed at the time of making it that the promissee understood it.**" (Emphasis supplied).

Section 13-714 R.C.M. 1947, Sec. 7540 R.C.M. 1935.

Analysis of the written assignment of leases (R. 23-26) and the written operating agreement discloses the existence of a prior verbal agreement pursuant to which Troy executed the written assignment. The terms, intent, provisions, conditions and considerations of such verbal agreement were not reduced to writing and resort must be had to oral testimony to determine what they were. Thus the written assignment is uncertain since it is silent as to the actual oral agreement and oral testimony of witness, T. P. Jones, the representative (president) executing the assignment for Troy (R. 23-26) and who also signed the operating agreement for Troy (R. 17) may give oral testimony as to what the terms and intent of verbal agreement was as authorized by the foregoing provisions of the Montana Codes.

Brown et al. v. Homestake Exploration Corporation, et al, 98 Mont. 305, 39 Pac. (2) 168;
Van De Putte et al v. Texas Pacific Coal and Oil Company, 35 Fed. Supp. 794.

Obviously the terms of a verbal (parol) agreement may be proven only by oral testimony.

The complaint (R. 6 ll. 20th to 32nd) alleges the express oral agreement between Troy and Ohio made prior to reduction of the assignment to writing was that Troy's share of the "costs and expense incident to the drilling, development and operation of the lands described in said "assignment" for the production of oil and gas chargeable against the share of said syndicate of the oil and gas production from the described lands would be restricted and limited exclusively to the cost of the actual drilling itself of the wells at their locations on said lands except the expense of the drilling of the first well which was to be borne solely and wholly by the Defendant, and the placing of said well in condition to deliver the oil and gas production therefrom at their respective locations upon said land plus the actual cost of the equipment located wholly within and upon the said lands and the actual cost of the installation of said equipment and that all other costs of operating said lands and producing and marketing the oil and gas therefrom would be the sole expense of and wholly chargeable to the Defendant alone." (R. 6 ll. 20-32, R. 7 ll. 1-12). The oral evidence submitted to the trial court as proofs of the allegations was contained in the deposition of T. P. Jones (R. 413-509). Over objection of counsel for Ohio as to competency of witness to testify to any oral conversations, oral communications or direct transactions with F. E. Hurley, Art Sellery or John McFadyen, agents then de-

ceased of Ohio, and as being an endeavor to vary the terms of a written instrument by parol testimony (R. 421) Jones testified:

"Q. (By Mr. McCabe); Now Mr. Jones, on the date that this instrument, the original of Plaintiffs' Exhibit 2, was signed by the parties named therein, did you have any conversation with Mr. Hurley and Mr. Gee with reference to entering into any arrangements for the drilling and development of lands of the Troy-Sweet Grass Oil Syndicate?

A. I did.

Q. And was that on the same day as the agreement was signed?

Mr. Donovan: I object to this as leading.

Mr. Everett: Let's let the witness testify, Mr. McCabe. You are insisting that we not have an objection to the form of the question, but still you insist on making the questions leading.

Mr. McCabe: I don't think that is leading.

Mr. Everett: Of course it is leading. You are on direct examination now. On cross-examination we can lead him all over the place, but you can't.

(Last question read).

A. It was.

Q. (By Mr. McCabe): Now, what did Mr. Hurley or Mr. Gee in the presence of yourself and Mr. Gee and Mr. Hurley say to you in connection with * * *

Mr. Donovan: That is objected to as being uncertain. (441) It doesn't designate the person. It is also uncertain as to the place where the alleged transactions or conversations were had.

Q. (By Mr. McCabe): Where was the original of Plaintiffs' Exhibit 2 signed?

A. In my office in Shelby, Montana.

Q. And at that time who was present?

A. Mr. Hurley, me, Mr. Luke, my secretary—the secretary of the Troy-Sweet Grass and this other gentleman, Mr. Sellery. Mr. Hurley and Mr. Gee came in there and asked me to know if I could and would make an operating agreement on some land held by my company that I represented, and I told them
* * * *

Q. Just a minute. Who was it asked you that—Mr. Gee or Mr. Hurley?

A. Mr. Hurley, after they introduced themselves.

Q. And what did you answer?

A. Well, I asked them—They described the land that they wanted to make an operating agreement on. I couldn't describe them right here now. And I told them that I had contacted the California a couple of times prior to that, of they had contacted me and wanted some lands on a fifty-fifty operating agreement, and presented me with a copy, which I read, and I objected, or told them what I would do; I would dictate the terms of the contract.

Q. What did you say to them in response to their inquiry whether you would be willing to enter into a deal?

A. Well, I told them that I would under my terms.

Q. Then what did they say to you?

A. They asked me what my terms were, and I explained them (442) to them.

Q. What did you tell them the terms were that you wanted?

A. I told them that I would enter into an agreement with them, but not where any expenses would be charged to this land off of the lease, of Findley, Ohio, or any place else off of that lease, and so then, after a conversation of quite a while, why, Mr. Hurley, or one of them spoke up and said, "Well, the charges wouldn't be in excess of probably ten per cent," and I told them, "All right, gentlemen, if that is all it will be, I will give you forty-five per cent and you can take fifty-five per cent, and you can pay the expenses, and put that into a lease, and we can make an agreement," and Mr. Gee said he would write up that kind of an agreement. I said, "There is a typewriter here and paper." He says, "I have a typewriter right over here, and I will go over and write it," which he did, and when he came back he had an operating agreement written up in duplicate. I think it was triplicate.

Q. A moment ago you said that in this conversation you told them you would give them the forty-five per cent, and also you said you would give them the fifty-five per cent.

A. No, I said I would give myself forty-five per cent and them the fifty-five per cent.

Q. That is what I wanted to get straightened out.

A. If they would bear all of the expenses, in place of a fifty-fifty, and charge me only what operating expense was incurred right on the lease, and they said * * * *

Q. Now, just a moment. Was there any particular form of expression that you used at that time as designated the (443) expenses chargeable?

A. Well, I said that their expenses would be charged all over the country, their overhead,

the accounting and everything else would be charged up against that lease, and I had no way of keeping account of that.

Q. Was that under the fifty-fifty operating agreement?

A. That was the fifty-fifty.

Mr. Everett: We object to the form of the question there again. There is no fifty-fifty operating agreement here in evidence. If you are going to question him about some other contract, let's get it out here, Mr. McCabe; otherwise, we will have to object to the form of the question and insist that the Court consider our stipulation with you as not in effect because you are not following it. Certainly, we are not going into the trial of this case with any sort of an understanding that we won't object to the form of the question and let you proceed in a manner that is absolutely contrary to that agreement and at the same time try to hold us to it.

Mr. McCabe: Well, the witness testified that they suggested fifty-fifty and he said he wouldn't go into that agreement.

Mr. Everett: You are asking him about a fifty-fifty agreement, but there is no such agreement in evidence.

Q. (By Mr. McCabe): Now, Mr. Jones, did you, at the time when they first approached you, or that is, when Mr. Hurley and Mr. Gee first spoke to you about any deal concerning the Troy-Sweet Grass Syndicate leases or lands—did they have a form of agreement with them?

A. Yes, they had some blank forms, fifty-fifty. (444)

Q. And was that agreement they had commonly

called, a form known as a fifty-fifty operating agreement?

Mr. Donovan: We object to this as leading; object also on the formal ground that all oral negotiations are deemed to be merged in the written contract. Prior oral negotiations and statements are entirely irrelevant and immaterial.

Mr. McCabe: Just answer the question.

(Last question read.)

Mr. Everett: We object on the further ground that the witness has not been qualified as an expert to testify as to what was the commonly known form or any other form of contract.

Q. (By Mr. McCabe): Just a moment. Mr. Jones, this first written form that they submitted to you, did they call it or designate it by any name?

Mr. Everett: I object to that, too.

A. Fifty-fifty operating agreement, they told me it was.

Mr. Donovan: This is objected to because that is leading.

Q. (By Mr. McCabe): Now, answer the question again.

A. They called it a fifty-fifty operating agreement.

Q. Who called it that? A. Mr. Hurley.

Q. At that time did you make any objection to that type of agreement? Did you state to them that you had any objection to that type of agreement?

A. I did.

Q. What did you tell them?

A. I told them that I had objected to the California a couple of days prior, and I objected to theirs. I wouldn't go into that kind of an agreement with anybody. (445)

Q. Now, when you outlined or stated to them as you testified, the terms of the deal that you would go into with them, did you mention in describing the expenses, or did you describe the types of expenses that you would be willing for the company to pay their share of?

Mr. Donovan: This also is objected to as leading and suggestive."

R. 423-429.

"Q. Now, when you outlined or stated to them, as you testified, the terms of the deal that you would go into with them, did you mention in describing the expenses, or did you describe the types of expenses that you would be willing for the company to pay their share of?"

Just answer "Yes" or "No."

A. I did.

Q. Now, what did you say:

A. I told them I would be willing to share the expense of drilling wells, putting them into production on the lease, but not a lot of outside expenses all the way around the country, which Mr. Hurley said probably it wouldn't amount to much; probably ten per cent or less, maybe.

Q. And then what did you say:

A. I said, "All right, let's do this: I will give you five per cent of ours, making yours fifty-five per cent, and you pay all of the expenses outside the lease."

Q. Let me see if I understand you correctly. Did you say that your people would take forty-five per cent and you would give the company fifty-five per cent?

A. Yes, which would make it ten per cent to pay the outside expenses. Mr. Gee said he could write up a contract (447) covering that.

Q. Was there anything said at that time pertaining to the corners of the lease?

A. These expenses was to be just what was on the lease; not off the lease.

Mr. Everett: We object to that question and answer, the question as being leading, and ask that the question and answer both be stricken.

Q. (By Mr. McCabe): Now, after this conversation did Mr. Gee return to you a form of proposed operating agreement to be signed?

A. He did.

Q. And did you read it?

A. I did, and objected to it.

Q. Just a moment. You say you did. When you read it, what did you say to him?

A. I told him that the objections that I had made and wished to put in the lease wasn't in there. He said, "I will go and rewrite it and include it in there," and he did.

Q. Just a minute. After he said that he would change it and include it into the lease, did he go away, or what did he do?

A. He went away, over to his office, and was gone a while and came back with some copies rewritten, which had * * *

Q. Just a moment. Copies rewritten—of the proposed form of agreement?

A. Yes, sir.

Mr. Everett: Let's let the witness testify. This leading business, I think we understand what it is, and it will certainly simplify it from the standpoint of the examination, too.

Q. (By Mr. McCabe): Did you read the last form that he returned to you?

A. I did, and he pointed out to me where it was covered; my objections were covered in it.

Q. What did he say when he pointed out that paragraph?

A. He said that covered the objections that I had; that there would be no charges against the company except what was done on their ground; the way I understood it; as he explained it to me, at least.

Q. At that time was there any agreement similar to the one concerning which you have testified made with Potlatch Oil and Refining Company?

A. Yes.

Q. And with reference to the form of that agreement, was that similar to this agreement?

Mr. Donovan: We object to this.

Mr. McCabe: All right. I withdraw it.

Q. When Mr. Gee made this statement concerning this portion that he had included in the proposed form of operating agreement, was Mr. Hurley present?

A. Yes, sir.

Q. And after he made that statement, what did you do with reference to the original operating agreement of which Plaintiffs' Exhibit 2 purports to be a copy?

A. What did we do?

Q. What did you do?

A. We signed it up.

Q. You signed it, and who else signed it?

A. Mr. Luke signed it and the Ohio men (449) signed it.

Q. And by "the Ohio men," who do you mean?

A. Why Hurley and Sellery. I don't know whether Gee signed it. I don't think Gee signed it, as I remember."

R. 430-433.

On cross examination the witness testified:

"Q. Were the expenses of operation supposed to be paid by Potlatch or Troy Sweet Grass or Inland Empire?

A. Expenses on the lease were supposed to be paid, for the drilling of wells and putting them into production, but that is as far as the expenses were supposed to be paid by (481) the Potlatch and the Troy-Sweet Grass, drilling the wells and putting them into production. That was my interpretation of it. That is what I understood it was, what the contract called for.

Q. Was it your contention that Potlatch was to pay no part of the cost of operation after the well was drilled and put in production?

A. Well, no. It was my contention that they wasn't to pay after the wells was drilled and put into production.

Q. The Ohio was to pay the expenses, pay everything?

A. Yes, pay everything.

Q. Without any part of the charge being made against Potlatch?

A. Not after they were producing.

Q. That would include all costs of operation?

A. Yes, sir:

Q. No part of the cost of operation, pumping the well, would be paid by Potlatch of Inland Empire?

A. Nothing off of the lease.

Q. No, I mean no part of the cost of operating the well would be paid by Potlatch after the well was once drilled and put on production? Is that what we are to understand?

A. They were to operate the lease. We were to pay for drilling the wells or getting them to producing. We were to pay—then they were to operate the wells and give us our forty-five per cent, and they were to charge us nothing after that.

Q. Charge you nothing after that?

A. No.

Mr. Everett: Let me see that contract a minute. (482)

(Exhibit 2 handed to counsel.)

Q. The contract about which you testified earlier, Mr. Jones, reading from Paragraph 3 of Plaintiffs' Exhibit 2, provides, and referring to The Ohio Oil Company as party of the second part: "It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part forty-five per cent thereof."

A. Yes.

Q. Now, am I to understand from your testimony that that doesn't mean what it says? What does that mean to you?

A. My interperation of the lease was that they should drill the wells and put them in produc-

tion and we would pay our forty-five per cent of it.

Q. And from there on you pay nothing?

A. No, no.

Q. Well, you were to pay your cost of operation, then?

A. Well, that wasn't the way I understood it. They were to ---

Q. How did you understand it?

A. I understood they would drill the wells and charge us after the first well was drilled, the free well, no cost to us at all. Then they would drill the wells and equip them and we would pay our forty-five per cent of drilling the wells and equipment, and nothing for supervision or accounting outside of that, and then after they were drilled they could pump them and take the oil and pay us forty-five per cent of the oil.

Q. What about the cost of operation?

A. Operation would not be much after the (483) well drilled and operating. That was up to them.

Q. And no part of that was to be charged to the Potlatch?

A. Except for the maintenance of the equipment and so on. No labor was to be charged to the Potlatch.

Q. No labor was to be charged to the Potlatch.

A. No.

Q. You testified you were engaged in other businesses. Isn't labor a cost of operation? Is it your contention that labor is not a cost of operation?

A. Yes, I understand all of that. I do lots of busi-

ness, but we had an understanding what it was to be. Mr. Gee and Mr. Hurley said that would cover the whole thing. That was the clause I had put in there, and there would be nothing charged to us after the wells were put into operation.

Q. You were not to be charged with the cost of operation? Did you read this contract before you signed it?

A. I surely did.

Q. Well, what does "all costs and expenses of developing and operating said lands"—what does that mean to you?

A. It means what it says.

Q. Were they to make—was it your understanding that any part of the amount charged to you was to be paid in cash—charged to oyur company; any of the amount, the expenses of developing and operating, charged to Potlatch? Were they to be paid in cash?

A. By who?

Q. By Potlatch.

A. No. They were taken out of production, interest and all. (484)

Q. Suppose the charge exceeded the credit, were you to be held beyond that?

A. No, no, no. If they didn't get the production, they were out. We weren't to be held at all.

Q. Well, isn't that what your phrase says here, then: "But in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands"?

A. Read that again.

Q. Let's go back. Isn't that what your phrase:

"But in no case shall said party of the first part" (referring to the Troy-Sweet Grass) "be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands"? Isn't that what that means?

A. I don't gather what you are driving at. It means just what it says there.

Q. Well, it is payable out of oil? isn't that what it means? The amount that was charged to you was payable out of oil produced?

A. Absolutely.

Q. And that is what you mean by your contract?

A. Yes, sir, that they are to take their pay out of any oil they find.

Q. So if there was more due than there was oil to pay, the Ohio got nothing?

A. The Ohio got nothing.

Q. And that is what that phrase meant, that they didn't get paid unless the oil was there; unless they had production?

A. That phrase meant that they should charge against that lease nothing only what was on the lease. (485)

Q. That was your contention?

A. Yes, that is the way we understood it right there that day, and that was drilling the well and the equipment that went into that.

Q. You objected also to the interest charges, did you, on the monies advanced?

A. I objected to the interest charges so long as there shouldn't have been any charge to us. They had us charged with a lot of stuff that didn't belong to us and charged us interest on it. I objected to that, of course.

Q. Did you object to any other interest charges?

A. No, not where we legally owed them.

Q. Well, there is a $10,000 balance they charged you interest on?

A. They charged us interest. Maybe that balance shouldn't have been so big, though. That is what I am contending; that balance shouldn't have been that big, maybe, if they had us charged with a lot of stuff that didn't belong to us.

Q. That was your contention?

A. Yes, that was my contention.

Q. Did the Ohio, insofar as the balance of the contract, except for the accounting phases of it, comply with all of the provisions?

A. Why, yes and no.

Q. Well, explain your answer.

A. Well, Mr. Hurley impressed upon me that they could drill wells cheaper than anyone else because they had lots of tools in the field and there would only be a charge of reasonable rent for tools in the field against that lease; there (486) would be no tools charged, only rental; and they could drill wells cheaper than I could. I could drill some of them wells for $10,000 myself; most of them.

Q. Well, there was still a matter of the amount of the charge. So far as complying with the contract, if they were obligated to drill a well, they drilled it?

A. Oh, yes. I had no kick on the accounting of the amount of wells they had drilled on the lease. I hadn't when I left there. I didn't care—when they drilled out there and got water, well, I didn't care about them going

on the other side and drilling another water well.

Q. The only complaint you had was the matter of the accounting, the charges?

A. Yes, sir.

Q. Otherwise, they complied with their contract?

A. On drilling wells, they did."

R. 467-473.

In the case of Brown, et al, v. Homestake Exploration Corporation, et al, 98 Mont 305, 39 Pac. (2) 168, the Supreme Court of Montana in construing a contract for development and operation of lands for oil and gas which contained a provision for drilling of exploration wells "to such number and extent as the premises will admit of" held such quoted clause ambiguous as to the number of wells and that parol evidence was admissible to show what the intent of the parties was at the time of the making of the contract. The Court reviewed, at length, prior decisions of the Court and the Montana statutes pertinent to ambiguous and uncertain provisions of contracts, and which prior decisions sustained the principle of the cited case.

In the action of Van De Putte et al v. Texas Pacific Coal and Oil Company, 35 Fed. Supp. 794, this Court considered and interpreted the same agreement that was considered by the Montana Supreme Court in the Brown case, above cited, as to items of expenses properly chargeable by the operating company against the other parties to the agreement.

We quote from the opinion of this Court as presenting a clear and concise statement of the questions of chargeable expenses proper under the agreement.

"Homestake, a corporation, engaged in the drilling and operation of oil and gas wells, agreed to develop the lands embraced within these permtis according to the terms of the said agreement. Homestake is to stand the expenses of drilling the first well and, if production is obtained, 'shall be reimbursed for the expense of drilling said well out of the proceeds therefrom *** but not otherwise.' Further provisions respecting all wells drilled by Homestake are that they: 'Shall be drilled at its own expense, but shall be reimbursed for the said expenses of drilling out of the net production obtained from the lands'; 'The net proceeds of all oil and/or gas produced and saved' after payment of royalties 'and after paying the expenses of the drilling operation conducted upon said land, shall be divided equally between the parties **'. Another important provision relating to expense is found in paragraph 7 of the agreement, as follows: 'It is expressly understood and agreed that the term "expense of drilling" or the term "expense" where used herein to denote the expense of sinking a well for the purpose of producing oil and/or gas shall be defined to mean only the actual cost and expense of drillings, equipping and placing all wells in a state of production and such other expense as may be necessarily incurred in development and operation of said wells, and of maintaining them in a state of production, with an additional ten per cent (10%) thereof added thereto for administrative, engineering and overhead expenses.' In another part, paragraph 8, Homestake agrees to furnish second parties an accurate and detailed statement of its operations provided for in the agreement."

35 Fed. Supp. 795.

Under section 43 (a) Federal Rules of Procedure, the evidence is admissible if same is admissible under any rule of evidence, state or federal. The rule reads:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

As will appear from the authorities cited in subsequent paragraphs of the within brief, the present action is a proceeding in equity. Under the foregoing rule the principle which favors the reception of evidence is to be adopted and, if admissible under any of the rules of evidence, state, federal, or rules heretofore applied in courts of equity, it is admissible in the present controversy.

> "In equity the rule apparently is that all evidence should be taken and entered in the record even though the court rules out the testimony and therefore objections as to irrelevancy and admissibility are not to be considered. The only limitation upon the extent of the examination is apparently that it should be confined to the issues and not violate the personal privilege of the witness."

Blease v. Garlington, 92 U. S. 667, 23 L. Ed. 521.

Continental Securities Co. v. Interborough Rapid Transit Co. (C.C.A. South Dist. New York, 1910) 183 Fed. 132.

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor" (Ohio) "believed at the time of making it that the promissee" (Troy) "understood it."

Section 7540 R.C.M. 1935.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

Section 7545 R.C.M. 1935.

In this case the attorney for the Ohio prepared the agreement and hence was responsible for the uncertainty, thus making applicable the preceding statutes cited.

The Operating Agreement was entered into by Troy and Ohio for the development and operation of the lands described for "oil and gas purposes' and Troy at the time had theretofore conveyed an undivided fifty-five percent (55%) interest in the lands to Ohio. (R. 17, 23) The control and management of the lands and leases and of the development and operation thereof for oil and gas purposes, including the marketing of the oil and gas produced, was given to Ohio. (Par. I of Operating Agreement, R. 18).

Ohio promised to drill a first well on the lands "free of all costs and expense" to Troy and, if a

failure and of no commercial value, Ohio could surrender the leases and thereupon Troy would have no right or title whatsoever in tools, materials or equipment of any kind furnished for the drilling of such well. (Par II of Operating Agreement), (R. 18, 19).

Paragraph III of the agreement (R. 19, 20) then delineates the obligations of Ohio if the first well was a producer, "commercial well," and the extent of Troy's liability for "expenses." The question presented to the Court for determination is, what was and is the liability of Troy and its successors, Inland and Potlatch, for expenses connected with Ohio's performance of the Agreement? Plaintiffs assert their liability and Troy's was limited to sharing a part only of the expenses Ohio claims it incurred and Ohio claims Troy's and plaintiffs' liability extended to forty-five percent (45%) of all expenses, direct and indirect, and irrespective of how or where incurred by Ohio in connection with its interpretation of the contract plus an additional ten percent (10%) for alleged "overhead" expenses, notwithstanding no ten percent (10%) allowance for overhead is mentioned as chargeable against Troy or its successors and notwithstanding words of limitation in the agreement to the effect Troy (and successors) **"in no case shall"** "be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands" (R. 20 ll. 8-11). An examination of all the

provisions of paragraph III clearly discloses ambiguity and uncertainty concerning "expenses" chargeable to Troy and plaintiffs. This paragraph (R. 19, 20) reads:

> "III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part Forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application from proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8%) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party's until the same shall

have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production."

The Court will observe that Ohio's interpretation of this paragraph would necessitate the language of the paragraph to provide substantially that if the first well drilled was a "commercial well" all costs and expenses of every kind and character incurred by Ohio in performing its obligations plus an additional charge of Ten (10%) percent to be added to the total of said costs and expenses as overhead expense, and Ohio shall be reimbursed by Troy solely from Troy's proportion of the oil and gas produced and sold from said lands, and that Ohio shall have a lien upon Troy's interest in the production and in the equipment in and upon the land; Ohio shall be entitled to and shall charge Troy Eight (8%) percent interest upon Forty-five (45%) percent of the total amount expended by Ohio until same shall have been paid out of the proceeds of Troy's proportion of the oil and gas produced and sold, said interest to be also paid out of Troy's share of the production from the lands.

The express language of paragraph III (R. 19, 20) is considerably different from what Ohio claims it substantially reads and means. Analyzing the paragraph, the provisions thereof appear substantially in the following order:

(a) If the free well to be drilled shall prove a commercial well, Ohio shall continue the "work of

developing and operating said premises" in as diligent a manner as warranted by field and market conditions and as consistent with good business management.

(b) Ohio will pay "all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided." Observe that Ohio is expressly limited to all costs and expenses of **"developing and operating said lands for oil and gas purposes, as herein provided and charge"** Troy Forty-five (45%) percent thereof. (Emphasis ours). No provision appears for Ten (10%) overhead or for expenses for operations or developments outside of the lands particularly described.

(c) Ohio shall market all oil and gas produced upon said land and "account" to Troy for the undivided Forty-five (45%) percent of the proceeds thereof at the prevailing market price at the wells for said oil and gas after "deducting all royalty oil and gas" or the proceeds thereof. The Court will note that no deduction for any "marketing expenses" is stated (R. 19).

(d) Ohio is to be "reimbursed" by Troy "solely from" Troy's "proportion of the oil and gas produced and sold from said land" (R. 19, 20).

(e) Application from proceeds from sale of the oil and gas will be "made to the credit of" Troy's "account upon the first day of the month following that in which oil and gas is sold, **but in no case shall" Troy "be finally held or charged beyond its share or**

interest in the production and equipment from, in or upon said lands." (Emphasis supplied.) (R. 20)

(f) Ohio is to charge Troy Eight (8%) percent interest upon "all moneys so advanced for the development and operations upon said lands for the account of the interest of Troy "until same shall have been paid out of the proceeds of" Troy's "proportion of the oil and gas produced and sold as herein provided ,said interest payments to be also paid out of production." Paragraph IV (R. 20) of the Operating Agreement provides for monthly statements to Troy and provides:

> "IV. The party of the Second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part."

We respectfully request the Court to observe the language of this paragraph as to the scope of the statements as being limited to the **"actual cost and expenses of developing and operating said lands and leases"** and that no provision is made for overhead or expenses elsewhere than on the lease and no provision for marketing expense.

In view of the different language and expressions appearing in the agreement as to what expenses

Ohio actually is entitled to reimbursement from Troy and which language and expressions express varying concepts of expenses there is presented a clear case of ambiguity and uncertainty in the Operating Agreement as to the intention of the parties as to expenses chargeable against Troy.

The agreement properly distinguishes between expenses for developing the land for oil and gas, operating the land for oil and gas, and of marketing the oil and gas production. In paragraph III of the agreement in referring to reimbursable expenses the following varying expressions appear: "all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided;" then "second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) percentum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof." (This would indicate that expenses would be confined solely to development and expenses incident to placing the wells in condition to deliver the product at the wells only); then "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the **production and equipment from, in or upon said lands,**" (Emphasis supplied.) (Here is indicated that Troy would be charged with its Forty-five (45%) share of the cost of equipment on the lands and to be paid out of

its share of the production);

Troy to be liable for Eight (8%) percent interest "upon all moneys so advanced for the **development and operations upon said land,**" (Emphasis ours), indicating Troy chargeable with interest on its share of moneys paid out for **development and operations upon the lands only.** In paragraph IV **"actual cost and expenses of developing and operating said lands and leases."** (Emphasis ours).

The agreement fails to furnish any certain guide to determine what was the intent of the parties as to expenses to be charged against Troy's share of the production.

The charges contained in the statements rendered by Ohio (Exhibits "A," "B," "C," "D,") cover a wide range of expenses both on and off the lands, traveling expenses, percentages of expenses irrespective of whether such expenses ever incurred in developing and operating the lands involved, traveling expenses of employees and representatives of Ohio between various points in Montana and Wyoming, expenses incurred by Ohio as a convenience in its operating many other leases and lands in the Sunburst field showing that Ohio interprets the agreement as justifying all expenses incurred by Ohio in all of its operations in the area and not to be confined to "actual expenses of developing and operating the particular lands." The interpretation placed by Troy and the plaintiffs restricts and limits the charges to be made against them.

The Operating Agreement was prepared by Mr. Gee, (R. 425, 555, 583) the attorney for Ohio at the time, and since the agreement is ambiguous and uncertain, parol evidence is admissible to show what was said and done at and prior to the signing of it and what the representative of Troy (Jones) understood what it meant and what Ohio believed Troy understood it to mean at the time.

The testimony of the witness as to the provision of the Operating Agreement, as same was finally written by the attorney for Ohio, which the attorney pointed out as having been inserted for the purpose of limiting the expenses chargeable to Troy and to meet Mr. Jones' objections to the "fifty-fifty" form of written agreement and the second form of written agreement theretofore submitted to him by the attorney, Mr. Gee, appears in Jones' deposition, (R. 422, 423, 431, 432), and it appears therefrom that Ohio's attorney particularly pointed out the clause of paragraph III of the Operating Agreement which reads, "but in no case shall said party of the firs tpart be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands." Ohio retained the forms of agreement objected to by Jones (Jones' Dep. R. 432) and returned the Operating Agreement which was finally signed (R. 432).

The cross examination of this witness by counsel for Ohio appears with reference to the signing of the agreement, and the circumstances thereof and

substance of the conversation relative to limitation of expense charges appear (ante at pages 19 to 34) herein. The substance of the testimony is that there was a limitation of expense chargeable against Troy, that Troy gave Ohio 5% of the production as covering operating expenses incurred after the wells were drilled and put into production, (R. 425, 426, R. 430, 431), that Troy was to be chargeable with 45% of the cost of drilling the wells, equipping same, installing and maintaining the equipment, placing the wells in a state of production, except the costs of the first well to be drilled which was to be a free well to Troy, and interest to be charged on the above enumerated charges other than the costs of the first well. Mr. Jones' testimony has support in the language of paragraphs III and IV (R. 19, 20) of the Operating Agreement, referring to expenses of **"developing and operating said lands for oil and gas purposes,"** (emphasis ours) that Ohio would account to Troy for 45% of the oil and gas "at the prevailing market price at the wells for said oil and gas" indicating a cut off of expenses chargeable after the oil and gas could be taken at the wells which would be at the top of the casing heads on the wells, that Troy would not be finally held or charged in any case beyond its "share or interest in the production and equipment from, in or upon said lands" (R. 20 ll. 8-11); that the monthly statements would show "actual cost and expense of developing and

operating said lands" (R. 20 ll. 20-24) and that the interest charges would be limited to mones advanced for "development and operations upon said lands" (R. 20 ll. 11-16).

The conduct of Jones in objecting to charges on behalf of Troy and plaintiffs after first statements rendered to Troy (R. 440, 472, 467, 462, 463,) and later to Inland and Potlatch, including the substance of the letter from Mr. Freeman to Ohio dated August 8, 1925, wherein, in paragraph 5, reference is made to the conversations testified to by Jones at the time the agreement was negotiated and the expense limitations discussed in this conversation (Exhibit "A" attached to defendant's answer corroborates Jones testimony).

In the letter from Ohio (Exhibit "B" of defendant's answer (R. 73, 84, 85) in answer to Mr. Freeman's letter in the fifth subdivision of paragraph "(5)" of such answer, referring to the conversation mentioned, no denial is made that such conversation occurred. The letter states "The representatives of the Ohio Oil Company who made this contract with your clients do not recall any conversation relative to making charges against Troy-Sweet Grass Oil Syndicate for the actual amount of expenses incurred on the lease itself, or as you say, within the four corners thereof" (R. 85 ll. 10-16). Here is presented a situation where the Ohio representatives were called upon for a definite admission or a denial but avoided

doing so by the old evasion "do not recall", and this at a time when Jones of Troy and Potlatch and Wilson of Inland had been objecting repeatedly to certain charges made by Ohio (R. 440, 447, 517, 518).

Jones' testimony, above discussed, is clearly within the statutory rules and rules of decision of the Montana Courts relative to interpretation of written agreements and admissibility of evidence to aid in such interpretation (ante pp. 17-37).

We respectfully submit that the Operating Agreement should be interpreted to limit the expenses chargeable to the 45% interest of Troy, Inland, and Potlatch, respectively, to the cost and expense of drilling the wells, equipping same, maintaining such equipment, and labor costs incident thereto, and placing said wells and maintaining same in a condition to make their production of oil and gas capable of being taken and paid for at the prevailing market price at the wells.

The testimony of T. P. Jones is admissible notwithstanding the deaths of A. M. Sellery, F. E. Hurley, John McFadyen, and T. B. Firmin.

When the deposition of witness Jones was taken counsel for defendants reserved certain objections to the anticipated testimony of the witness, among which objections were those which do not permit testimony as to conversations or transactions with a deceased agent or officer of defendant cor-

poration (R. 421) and when the deposition was admitted in evidence it was stipulated that same was admitted subject to all proper objections except as to the form of questions propounded to the witness (R. 175-186), except defendant waived objections from the standpoint of the best evidence rule, (R. 179, 180) as to plaintiffs Exhibits "2" (copies of Operating Agreement and Assignment attached), (R. 17-25), "26" (copy of letter from Freeman, Thelen and Frary to Ohio, dated August 8, 1925, pertaining to objections of Inland and Potlatch to expense charges being made) (R. 73-89) "27" (copy of letter from Ohio, in answer to letter from Freeman, Thelen and Frary, dated September 12, 1925, (R. 65-73), and "29" (copy of letter from Potlatch dated May 11, 1925, inquiring why it did not receive check from Ohio attached to Jones deposition).

Thus the question of admissibility of Jones' testimony relating to oral communications and transactions between the witness and the deceased agents and officers, above named, is presented for determination.

As heretofore shown the rule, whether state, federal, or equity, which favors admissibility of evidence is to be adopted by the Court in determining the question. (Rule 43 (a) Federal Rules of Civil Procedure).

Section 93-701-2 R.C.M. 1947, Sec. 10534, R.C.M. 1935, provides:

"All persons, without exception, otherwise than is specified in the next two sections, who, having

organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section 10508."

Section 93-701-3, Sec. 10535 R.C.M. 1935, in so far as pertinent provides:

"The following persons cannot be witnesses: * * *

4. Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done."

The section excludes as witnesses only "parties or assignors of parties to an action or proceeding or persons in whose behalf an action is prosecuted" against the defendant corporation as to facts of direct transactions or oral communications between the proposed witness and the deceased officer or agent of the corporation.

Jones is neither a party nor an assignor of a party to the action nor a person in whose behalf the action is prosecuted.

The parties to the action are Gerlough, Hodgman, and Larson, Trustees of Inland, maintaining the action in behalf of the trust estate, and Potlatch, a corporation, maintaining the action in its own behalf.

The mere fact that a person may have an indirect or remote interest in the results of an action, such a stockholder or member in a corporation is not a party to an action or a person in whose behalf an action is prosecuted within such a statute.

New Jersey Trust, et., Co. v Camden Co.
58 N. J. L. 196, 33 Atl. 475,

Rust v Bennett, 39 Mich. 521,
Bank v. McGarrah,
(Ga.) 48 S. E. 393, following

Cody v. First Nat. Bank
(Ga.) 30 S. E. 281,

New York Life Ins. Co. v. Johnson,
(Ky.) 72 S. W. 762,

Johnson v. Fraternal Reserve Assn.
(Wisconsin 1908) 117 N. W. 1019,

The interest must be direct and certain, not remote or merely a possible contingency as the interest of a stockholder in a corporation.

Kyle v. Kyle,
(Iowa 1916) 157 N. W. 248,

Bates v. Carter Construction Co.,
(Pa. 1916) 99 Atl. 813,

Merriman v. Wickerhem,
(Calif. 1904) 75 Pac. 180.

To disqualify a person under statute as being one for whose benefit the action is prosecuted, only one

who is absolutely entitled to the results of the litigation and not to one who may ultimately receive same.

Irwin v. Moore,
15 N. Y. 432,

Freeman v. Spaulding,
12 N. Y. 373,

Furthermore, defendant waived any objection it might have to Jones' competency by setting forth, as Exhibits "A" and "B" attached to its answer the letter from Freeman, Thelen & Frary to Ohio, stating the details of the conversation between Jones and Hurley and the letter from Ohio to Freeman, Thelen & Frary referring to the same conversation and in Ohio waiving objection to the letters offered as Exhibits "26" and "27" of the attached to the Jones deposition, (R. 179-180) and it having permitted the introduction in evidence without objection the letter from Inland to Mr. Hurley dated September 22, 1923, (R. 309-372) which letters are included among those in plaintiffs' Exhibit "O" (R. 303) (R. 65-89).

These circumstances removed the disqualification.

Ellis v. Wadleigh,
182 Pac. (2) 49, 70 C. J. Sec. 484, pp. 368, 369.

Independent of the foregoing considerations, the decisions of the Supreme Court of Montana, construing section 10535 R. C. M., (supra) have consistently held it is discretionary with the Court to permit a witness to testify as to oral communica-

tions with the deceased person, deceased representative of a corporation.

Mosback v. Smith Brothers Sheep Co.
65 Mont. 42, 51, 210 P. 910,

Pankovich v. Little Horn Bank,
104 Mont. 394, 403, 66 Pac. (2) 765,

Wunderlich v. Holt,
86 Mont. 260, 283 Pac. 423.

Averill Mach. Co. v. Taylor
70 Mont. 70, 223 Pac. 918,

Roy v. King's Estate
55 Mont. 567, 179 Pac. 918.

The statute provides for the admission of the testimony if, as the Court in Pankovich v. Little Horn Bank, 104 M. 395, at page 403, says, "if it sufficiently appears from the record that without it an injustice might be done." The Court interpreting the present agreement is confronted with the interpretation of the agreement and is entitled under the statute (Sec. 93-401-17 Sec. 10521 R.C.M. supra) to be placed in the position of the parties at the time the agreement was made to determine what the intent of the parties was. Unless the testimony of Jones is admitted as to the facts existing at the time, the Court in construing the agreement might so interpret the agreement contrary to the true intent of the parties. Particularly where there is other evidence in the record corroborative of the claim of plaintiffs, but insufficient without the evidence objected to establish plaintiffs' claim as stated by the Montana Supreme Court in Wunderlich v. Holt, 86 Mont. 260, 283 Pac. 423.

In Anderson v. Wirkman, 67 M. 176, 215 Pac. 224, an action was brought by the widow to recover for the wrongful killing of her husband by the administrator of the killer's estate. She was the only eye witness of the killing and she (although a party to the action) was permitted to testify since her testimony was indispensable to show the killing was wrongful.

We do not believe Jones was disqualified as witness by Section 93-701-3 Sec. 10535 R.C.M. Consequently his testimony pertaining to acts and declarations forming part of the transaction in dispute and evidence of such transaction, to wit, intent of the Operating Agreement was admissible.

Section 10511 R.C.M. 1935,

McCrimmon v. Murray,
43 Mont. 457, 471, 117 Pac. 73,

Stagg v. Stagg,
96 Mont. 573, 595, 32 Pac. (2) 856,

Welch v. All Persons,
85 Mont. 114, 129, 278 Pac. 110.

McCrimmon v. Murray was an action to recover on an agreement for payment to plaintiff for information to be given defendant relative to a vein of ore in defendant's mining claim. Evidence of the acts and declarations of defendant relative to his estimate of the character and value of the vein while he was examining same was excluded as hearsay. The Supreme Court on appeal held such exclusion of evidence was error. The Court said in

referring to the exclusion of the evidence (43 Mont. 471):

> "This was error. The examination was one of the series of steps leading up to the consummation of the contract, without the doing of which there would have been no contract."

If Jones be deemed an incompetent witness, the court can consider with the other competent evidence in the case the fact that the acts and declarations of the parties constitute matter within the meaning of the statute (res gestae) in exercising discretion favorable to the admission of such evidence within the exception expressed in section 93-701-3 R.C.M. 1947, Sec. 10535, Subd. 4 R.C.M. (supra P. 50).

In view of the provisions of Rule 43 (a) Federal Rules of Civil Procedure, favoring admissibility of evidence, we respectfully submit that the Court has the discretion to admit the testimony of Jones in this case, even if incompetent as a witness.

The deposition of R. E. Wilson of Inland (R. 515-519) relates to conversations and communications with representatives of the Ohio and under the authorities heretofore discussed, his testimony and exhibits referred to are admissible. His testimony will be more fully considered in a subsequent subdivision.

The plaintiffs' action is not barred by the statutes of limitation or by laches.

Precedent to discussion of defendant's affirmative defenses of statutes of limitations and laches,

it is necessary to determine the legal relationship, rights, and obligations of the respective parties because same will terermine in great measure the merit or lack of merit of the defenses of limitations and laches urged.

The pleadings and evidence present no dispute as to the following facts. Troy, the owner of oil and gas leases embracing 1,520 acres of land in Toole County, Montana, on June 15, 1922, made a written agreement for development and operation of the leased lands for oil and gas purposes with Ohio, and on the same date assigned by written instrument an undivided 55% interest in the said leases to Ohio in consideration of the assumption and performance by Ohio of the obligations specified in the agreement and which obligations, in brief, were that Ohio would operate the leased lands for oil and gas and market the production and, in the first instance, advance all monies for such purposes. Ohio obligated itself to account to and pay over to Troy 45% of the proceeds from the sale of oil and gas to Troy after first deducting from such proceeds certain stated expenses chargeable against Troy's share of such proceeds as specified in the agreement. (R. 5-9, 53).

On or about June 15, 1922, Ohio assumed possession, management and control of the lands and leases and thereafter purchased and appropriated oil from the lands until about January 31st, 1943, when it transferred its interest in the agreement

and in the oil and gas leases to The Texas Company (R. 8, 9, 53).

In the meantime, on January 1, 1923, Troy assigned (conveyed) an undivided 22½% interest in the aforesaid agreement as to one of the leases embraced in the assignment, known as the "Baker Lease" of 320 acres, to Inland and thereafter, about August 18, 1923, Troy assigned all of its remaining right and interest in the said agreement with Ohio and in the oil and gas leases involved to Potlatch, (R. 10, 11, 54). Clearly, the assignment and agreement between Troy and Ohio constituted a joint adventure by them. By the assignment they become tenants in common of the estate created by the various oil and gas leases which is held to be a "profit a prendre" by the decisions of the Supreme Court of Montana.

> Homestake Exploration Corporation v. Schorregge,
> 81 Mont. 604, 614, 264 Pac. 388.

Section 67-312 R.C.M. 1947 Sec. 6682 R.C.M. defines an interest in common to be:

> "An interesti n common is one owned by several persons not in joint ownership or partnership."

> Hochsprung v. Stevenson,
> 82 Mont. 222, 237, 266 Pac. 406.

Section 67-313 R.C.M. 1947, Sec. 6683 R.C.M. defines what interests are in common as follows: "Every interest created in favor of several persons in their own right, including husband and wife, is

an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in Section 67-308 R.C.M. 1947, Sec. 6680, R.C.M. 1935.

A joint adventure is broadly defined as an "enterprise undertaken by several persons jointly, and more particularly as an association of two or more persons to carry out a single business enterprise for profit, or as a special combination of persons undertaking jointly some specific adventure for profit, without any actual partnership or corporate designation, or an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge."

Rae v. Cameron
112 Mont. 159, 114, Pac. (2) 1060.

In Ivins v. Hardy 120 Mont. 35, 179 Pac. (2) 745, the Court held that where two persons jointly purchased land and engaged in the ranching and livestock business for profit, each to share certain portions of the expenses of the operation, such persons were tenants in common of the land and joint adventurers in the operation of the ranches and the plaintiff, and one of the joint tenants, was entitled to an accounting from the other tenant. The Court said: "The joint venture between the parties was but the natural dealing between tenants in common for the development and use of the common prop-

erties under a plan mutually beneficial to the tenants in common," citing Dunham v. Loverock, 158 Pa., 197, 27 Atl. 990. Referring to the cited case the Court said: "There tenants in common entered into an agreement to drill an oil well on their land." A dispute arose over the cost of the well, one tenant in common claiming a balance due from the other and claiming the existence of a partnership. The Court pointed out that the agreement claimed to be a partnership "was an undertaking which was appropriate to tenants in common, since it would increase the product of the common property." The Court further said, "To be sure, there was undivided possession of the lease, but unity of possession is one of the distinguishing characteristics of a tenancy in common. There was contribution to the cost of operating the well or wells, but this could be compelled between tenants in common by bill or by account render. There was division of the product, but this was in accordance with the rights of the cotenants. Each had a right to share in the product in proportion to his interest in the estate."

See also: Snider v. Carmichael,
102 Mont. 387, 58 Pac. (2) 1004.

The situation between the parties in this case is similar to the situation of the parties in the above cited cases.

Section 63-1001 R.C.M. 1947, Sec. 8050 R.C.M. provides:

"A mining partnership exists when two or more persons who own or acquire a mining claim for

the purpose of working it and extracting the minerals therefrom actually engage in working the same."

We submit that by reason of the corporate character of Potlatch and Ohio and the trust character of Troy and the trust character of Inland, the relationship between them under the agreements and various assignments did not constitute any partnership relationship, mining or otherwise, between them at any time notwithstanding the Supreme Court of Montana has held that an oil well is a mine.

Mid-Northern Oil Co. v. Walker,
65 Mont. 414, 211 P. 353.

The fact that Troy and its assignees, by express provisions of the agreement, were not chargeable for losses beyond their interest in oil and gas production if the venture was not successful does not change their relationship as joint adventurers.

Orvis v. Curtiss,
157 N. Y. 657, 52 N. E. 690,

The relation between joint adventurers is fiduciary and each have the right to demand and expect from their associates utmost good faith and scrupulous honesty in all that relates to their common interests, and each is forbidden to so act that his personal interest would be hostile to the other. The relationship is in the nature of trusteeship.

Dexter & Carpenter, Inc. v. Houston,
(1927 C.C.A. 4th) 20 Fed. (2) 647,

Mills & Willingham, Oil and Gas,
p. 281, 282, sections 190, 191,
48 C. J. S. p. 849, section 24.

Where through breach of fiduciary duty a joint adventurer acquires more than his proper share under the agreement, he will be deemed a trustee for the benefit of his co-adventurer.

3 Bogert Trusts and Trustees,
Sec. 488, pp 127-130,

Wiley v. Wirbelauer,
116 N. J. Eq. 391, 174 Atl. 20.

Under the operating agreement Ohio, by reason of the confidence reposed by Troy, was given possession and control of the lands involved, and of the development and operation upon the lands of the oil produced and of the proceeds from the sale of the production. As a fiduciary it occupied a relation of trusteeship, owing the duty to correctly and honestly account to and deliver to Troy, Inland and Potlatch, respectively, their just share of such proceeds; and the burden at all times rested upon Ohio to show that it has performed its trust and the manner of its performance in detail.

Wooton Land & Fuel Co. v Ownbey
265 Fed. 91,

Dexter & Carpenter, Inc. v. Houston,
(C.C.A. 4th) 20 Fed. (2) 647,
1 C.J.S. Section 39, p. 679.

Ohio is charged with failure to pay over to plaintiffs a portion of their rightful share of the proceeds from sales of oil and retain such proceeds notwithstanding demands made for a correct accounting for such proceeds and payment thereof.

Under such circumstances plaintiffs are entitled to maintain the present action for an accounting.

Kilbourn v. Sunderland,
130 U. S. 503, 32 L. ed. 1005,

Van de Putte, Adm. et al. v. Texas Pac. Coal & Oil Co.,
35 Fed. Supp. 794,

Pedowski v. Southern Mich. Fruit Assn.,
(1933 Mich.) 246 N. W. 58

1 C. J. S. section 14, pp 645, 646.

The testimony of Jones, Wilson, and Gerlough and correspondence (Plaintiffs' Exhibit "O" R. 303-368) show objections being made for improper debits and lack of proper credits to plaintiffs through the years. The letter from Attorneys Freeman, Thelen and Frary to Ohio, (R. 65-73) setting forth objections to correctness of the statements rendered, the testimony of Jones as to the intent of the agreement and its violation, clearly apparent when compared with the statements rendered by Ohio, (Plaintiffs' Exhibits "A" and "B" filed as original documents from from the trial court by order (R. 611, 612) received in evidence) disclose improper charges made; and the express promise of Mr. McFayden, manager, that all errors would be finally corrected at the time he requested Jones not to bring suit, Jones' compliance (R. 447-449) and then the sale made by Ohio to Texas, without notice of any kind to Inland or Potlatch (R. 229-230), disclose a situation where Ohio breached its trust and entitles plaintiffs to a correct and

honest accounting by Ohio, (Cases cited ante pp. 56-62.

Every person who voluntarily assumes a relation of personal confidence to another is deemed a trustee within the provisions of Chapter 144, Revised Codes of Montana, 1935.

Sec. 86-205 R.C.M. 1947 Sec. 7882 R.C.M. 1935.

In all matters connected with his trust a trustee is bound to act in the highest good faith and may not obtain any advantage therein over his beneficiary by the slightest adverse pressure of any kind.

Sec. 86-301 R.C.M. 1947, Sec. 7888, R.C.M. 1935.

Every violation of the provisions of the preceding sections is a fraud against the beneficiary of the trust.

Sec. 86-307 R.C.M. 1947, Sec. 7894, R.C.M. 1935.

One who gains a thing by fraud, mistake, the violation of a trust, or other wrongful act, is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

Sec. 86-210 R.C.M. 1947, Sec. 7887, R.C.M. 1935.

Obviously by virtue of the Operating Agreement and the above provisions of the statutes the defendant was a joint adventurer and chargeable as a trustee.

Under the laws of Montana and other jurisdictions neither the defense of the statute of limitations nor of laches is available to a joint adventurer or a trustee in an action brought by a joint adventurer or beneficiary for an accounting until after termina-

tion of the joint venture or the trust or the repudiation of the trust by the trustees.

Opp. v. Boggs,
Mont. 193 Pac. (2) 379,

34 Am. Juris. 290, section 374,
48 C. J. S. section 12, pp. 850, 851,

State v. Rorabeck,
111 Mont. 320, 325 108 Pac. (2) 801.

General Pet. Corp. v. Dougherty,
(C.C.A. 9th) 117 Fed. (2), 529, 540.

Merritt Oil Corp. v. Young,
(C.C.A. 10th) 43 Fed. (2) 27, Pars. (5-7)
pp. 31, 32.

48 C. J. S. section 12e, pp. 852, 853,

In case of a technical trust the statute of limitations does not run between the trustee and cestui que trust as long as the trust subsists, the possession of the trustee being the posession of the cestui que trust.

53 C. J. S. subd. 9,, pp. 954, 955.

State v. Rorabeck,
111 Mont. 320, 108 Pac. (2) 801.

Ohio at no time repudiated the agreement but continued thereunder to January 31, 1943, receiving its benefits and the profits on the operation besides the 8% interest profit charged under the contract against Troy and successors. Having received the benefits of the agreement, it equitably should bear the burdens incident thereto.

Sec. 49-113 R.C.M. 1947, Sec 8750 R.C.M. 1935.

Defendant's second and third affirmative defenses plead the five year and eight year statutes

of limitations, which refer to sections 9030 and 9029 R.C.M. 1935. (Now sections 93-2604 and 93-2603 R.C.M. 1947). In view of the decisions heretofore cited (ante pp. 63, 64) to the effect that between joint adventures the statute does not commence to run until the termination of the joint venture and as to a trustee and beneficiary the statute does not commence until there is a clear repudiation of the trust by the trustee and such fact brought to the knowledge of the beneficiary, the statutes have not barred the action. Ohio retained sole possession and control of the lands and operated under the agreement until January 31, 1943. Assuming, for argument only, the sale at that time to Texas Co. constituted a repudiation of the trust by Ohio and also constituted a termination of the agreement as to plaintiffs, neither the five year statute nor the eight year statute bars the action since this suit was started in March, 1947, or within four years and forty six days from the date of sale and within about four years after plaintiffs received notice of the sale to the Texas Co. when in March, 1943, they received statements from the Texas Co. covering operations for the month of February, 1943. (R. 229-230, Gerlough).

Adverting to the question of laches, the answer of defendant fails to allege facts constituting laches on the part of the plaintiffs. The allegations of the answer are substantially that F. E. Hurley died July 27, 1928, and A. M. Sellery died February

14, 1927, and plaintiffs did not commence this suit until March 18, 1947. These facts do not constitute laches. The Montana and Federal Courts are in accord that where an action is commenced within the period of the statute of limitations, prejudice will not be presumed and that the party asserting laches must show substantial prejudice which prevents justice being done.

Johnson v. Kaiser, et al,
104 Mont. 261, 65 Pac. (2) 1179,

Cox v. Hall,
54 Mont. 154, 168 Pac. 519,

Brundy v. Canby,
50 Mont. 454, 148 Pac. 315,

Parchen v. Chessman,
49 M. 326, 142 Pac. 631.

Apparently defendant erroneously concludes that the deaths of Messrs. Sellery, Hurley and MacFadyen were sufficient to establish laches. Such is not the rule.

Earle, Admr. v. Myers,
207 U. S. 244, 52 L. ed. 191,

Townsend v. Van der Werker,
160 U. S. 171, 40 L. ed, 383,

Nave-McCord Mercantile Co. v. Ranney,
(C.C.A. 8th, 1928) 29 Fed. (2) 383,

Oswald v. Camac,
(C.C.A. 5th, 1933) 65 Fed. (2) 610,

Porter v. Van den Burgh,
(Calif) 99 Pac. (2) 265,

Consolidated Placers v. Grant,
(N. M.) 151 Pac. (2) 48,

Pratt v. Shell Pet. Corp.
100 Fed. (2) 833 certiorari denied
306 U. S. 659, 83 L. ed. 1056.

Earle v. Myers (supra, 207 U. S. 244, 52 L. ed. 191) was an action by the administrator of the estate of a deceased joint adventurer against the surviving co-adventurer for an accounting for his share of the profits arising out of the venture being withheld by the survivor. Defense of laches interposed based on long lapse of time and the death of a party to the joint adventure agreement. The United States Supreme Court held that the delay and death of the party did not constitute laches. Accounting allowed.

In Townsend v. Van der Werker, 160 U. S. 171, 40 L. ed. 383, the Supreme Court held that the death of a party to an agreement whereby her testimony was lost was not conclusive of laches in an action to establish and enforce a trust and for accounting. The Court (40 L. ed. 387) said: "The delay is sufficiently accounted for by the intimate personal relations that had always existed between plaintiff and Mrs. Marvin and the unlimited confidence he had reposed in her." In addition to the confidential relations existing between plaintiff and the deceased she had promised the plaintiff she would make settlement of the existing matters between them and by reason thereof, plaintiff neglected to bring suit in her lifetime. The Court held that the same diligence could not be expected

of plaintiff under such circumstances as would have been required if the plaintiff had been dealing with a stranger.

In Nave-McCord Merc. Co. v. Ranney, 29 Fed. (2) 383, an action was brought for enforcement of a trust and accounting for value of good will on a sale of assets by the officers of a corporation to another corporation in which such persons were also officers. There was a delay of over twenty-four years from the time of sale in the commencement of the action. During the interin some of the parties to the original transaction had died. In denying the defense of laches and adverting to the fiduciary relations existing between the parties the Court held that laches is dependent upon the circumstances in each case and the doctrine is to assist justice, not defeat it. The Court said (29 Fed. (2) p. 391):

> "It is, of course, unfortunate that the men who were the most concerned with this matter, and who could have testified of their own knowledge as to what was said and what was done, have nearly all passed from the scene; but that is a matter to be considered in weighing the evidence and determining the facts. Townsend v. Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.
>
> The trial court was right in holding that the doctrine of laches should not be invoked in this case."

The case of Oswald v. Camax, 65 Fed. (2) 610, was for an accounting brought by a surviving joint

adventure against the executrix of the will and widow of a deceased co-adventurer to recover a share of the profits of the enterprise withheld by the deceased. The Court held that the death of the co-adventurer did not establish laches and particularly so in the case, since records of the joint account of the parties were available and the statute of limitations had not run. Accounting held proper remedy.

In denying the defense of laches the California appellate court held that death of a witness does not establish laches where other evidence consisting of books of account and credible evidence support findings and judgment for the plaintiff.

Porter v. Van den Burgh,
(Calif.) 99 Pac. (2) 265.

In Brooks v. Clintsman, 98 S. E. 742, the Supreme Court of Virginia held that death of a party does not constitute laches even though such party was the one who perpetrated the fraud by changing the name of the grantee in a deed.

In the instant case the original statements of the accounts between the parties are in evidence. Mr. Hurley's and Mr. Sellery's deaths cannot be attributed to plaintiff's as the cause thereof. Such events are hazards incident to life. The plaintiffs made their objections at times prior to the deaths of such persons and if these persons were alive, they could not contradict the testimony of witness Jones for the reason that in August, 1925, the at-

tention of Messrs. Hurley, Sellery, and Gee was directed to Mr. Jones' statement concerning the conversations and statements between the parties at the time of making the agreement, and all these persons stated was that they did not recall the conversations. (Letters of Freeman, Thelen and Frary and Mr. Firmin of Ohio, of which copies are attached to the answer of Ohio in this cause (R. 65-89) and referred to in deposition of A. M. Gee, (R. 568, 569) wherein he states he conferred with Mr. Firmin when the letter of September 12, 1925, was written to Messrs. Freeman and Thelen wherein it is stated, "The representatives of the Ohio Oil Company who made this contract with your clients do not recall any conversations relative to making charges against Troy-Sweetgrass Oil Syndicate for the actual amount of expenses incurred on the lease itself, or as you say, within the four corners thereof." In the deposition of A. M. Gee, in his answer to defendant's direct interrogatory No. 13 relative to the statement in Jones' deposition (R. 431) as to the terms, he specified he would make a deal with Ohio, the witness said, among other things, (Gee deposition, R. 559 lines 16-20) "If any such conversation had been indulged in, I am certain that I would have remembered it because of its most unusual character. I have no recollection whatsoever of such demand." Hence the deaths of Messrs. Hurley and Sellery did not prejudice defendant since they have in evidence Mr. Gee's

testimony to the above effect. Furthermore, the correspondence between the parties relating to the improper charges and other errors in statements rendered has been available and received in evidence (Depositions of Jones, Wilson, and plaintiffs' Exhibit "O", R. 304, 65-89).

Neither the pleadings nor the evidence support defendant's plea of laches.

On the contrary, the delay has benefited the defendant. It has had the use of the money represented by the alleged improper charges without interest through the years of the operation, although the plaintiffs were charged 8% interest on proper and improper charges, both, by Ohio until their share of the production paid the amount of such charges.

The plaintiffs in 1925 had retained attorneys to enforce their right of recovery for improper charges. Subsequent to the correspondence between the said attorney and Ohio in 1925, a meeting was held of the stockholders of Potlatch in the year of 1926, and after such meeting, Jones had a conversation pertaining to the Operating Agreement with Mr. John McFayden (who was general manager of operations in the Rocky Mountain region, including the lands involved in the agreement) and told Mr. McFayden that "if he didn't correct these things and make an accounting, we would have to enter suit against the Ohio Oil Company." Mr. McFayden replied. "Don't start no suit, because

the Ohio Oil Company is responsible and reliable, and eventually in the final account we will fix this thing up and pay you anything that was overcharged against you. You can rest assured of that. The Ohio Oil Company is responsible and reliable." He said, "I will use my efforts to see that it is brought to a head without a suit." (Jones' Deposition, R. 448).

Mr. Jones communicated the conversation with the directors of the different companies and as a result of Mr. McFayden's statement, no suit was brought. (Jones deposition, (R. 448, 449). Witness Gerlough corroborated Jones' testimony of having told the Trustees of Inland in 1926 or 1927 of the above mentioned conversation with Mr. McFayden. (R. 233-237).

Notwithstanding the death of Mr. McFayden, Jones' testimony is admissible under the authorities herein above presented on the admissibility of Jones testimony concerning the conversations had at the time of making the agreement and we respectfully refer the Court thereto (Ante pp. 48-56).

In view of the foregoing promise of the general manager, Mr. McFayden, the plaintiffs' delay in suing is excused and defendant is estopped to assert defense of laches and the statutes of limitations.

The pertinent principles are stated as follows:

Matters of explanation or excuse for delay in maintaining suit in equity vary, such as a promise

to satisfy the complainant's claim, an intimate or confidential relations between the complainant and the person whose conduct gave rise to the claim, and delay caused by the Defendant's conduct or that delay is attributable to the acts of Defendant.

19 Am. Jur., Sec. 503, p. 348.

It is established by the overwhelming weight of authority that the equitable doctrine of estoppel in pais is applicable in a proper case to prevent a fradulent or inequitable resort to the statute of limitations, and that a debtor may by his representations, promises, or conduct, be estopped to assert the statute where the elements of estoppel are present. Concisely stated, parties may by their words or conduct estop themselves from pleading limitations. The doctrine of estoppel to rely on the defense of limitations is entirely independent of statutes providing for the suspension of the statute by an acknowledgment or new promise, and will not be applied except where it would be inequitable to refuse to apply it.

34 Am. Jur. Sec. 411, pp. 323, 324,

Irregular practices on the part of a defendant in delaying the institution of an action estops him to assert the running of the statute of limitations pending such delay. The fact that the plaintiff has been prevented by the defendant from commencing action within the period of limitations operates to estop the defendant from pleading the statute of limitations.

34 Am. Jur. sec. 413, pp. 325, 326.

Opinions of court sometimes contain broad language which indicates that any conduct of the defendant which induces inaction on the part of the plaintiff whereby suit is delayed beyond the limitation period will estop the defendant from relying upon the statute of limitations. It has been said that any agreement whereby the claimant is lulled into security and thereby delays action creates an estoppel, and bars the debtor from relying on the statute of limitations. * - - - Moreover, an estoppel to set up the defense of limitations may rest on necessary implication as well as upon an express stipulation, and it need not be evidenced by any writing.

34 Am. Jur. sec. 413, p. 325.

A request not to sue, however, when coupled with other circumstances such as a promise to pay the claim or a promise not to plead the statute of limitations, estops the debtor to set up the statute.

34 Am. Jur. Sec. 419, p. 331.

Matters of explanation or excuse for delay in maintaining suit in equity vary, such as a promise to satisfy the complainant's claim, an intimate or confidential relation between the complainant and the person whose conduct gave rise to the claim, and delay caused by the Defendant's conduct or that delay is attributable to the acts of Defendant.

19 Am. Jur. Sec. 503, p. 348.

Duncan v. Dazey,
(Ill. 1925) 149 N. E. 495.

In Dexter & Carpenter, Inc. v. Houston, 20 F (2) 647 (C.C.A. 4th), an action for accounting between joint adventurers, the court held the obligation of utmost good faith and scrupulous honesty between point adventurers within the scope of the enterprise is in the nature of a trusteeship and that where a promise to make an adjustment of the claim was made by defendant to plaintiff and he failed to do so he may not rely upon the defense of laches since he held out a promise that was not fulfilled and which was accepted by the plaintiff.

R. E. Wilson, president and manager of Inland until sometime in 1926, discussed with Mr. John McFayden, a manager of Ohio and Mr. Yealy, representative in the area, when the monthly statements from Ohio commenced coming in, charges appearing in the statements and which the trustees did not agree to as they were not in the verbal agreement nor "up to the contract." Wilson was referred to the auditing department and Mr. McFayden said the Ohio Company was a reliable company and whatever was wrong would be made right, they would live up to contract. (Wilson Deposition, they would live up to contract. (R. 515-521, 539-542). Later Inland retained Freeman, Thelen son), got sick and left to go ahead and sue if they couldn't make a settlement. (Wilson deposition, (R. 520).

The number of authorities may be multiplied many times which hold delay alone does not bar an action between fiduciaries in absence of substantial prejudice. We submit the following decisions, additional to those heretofore cited, embracing delays, respectively, from nine years to thirty years holding laches not established.

McIntyre v. Pryor, (9 years)
173 U. S. 38, 43 L. ed. 606,

De Noble v. Galardo Y. Seary (over 35 years)
223 U. S. 65, 56 L. ed. 353,

St. Louis Car Co. v. Bull Co. (30 years)
25 Fed. Supp. 244, aff'd. 99 Fed. (2) 999.

Gunton v. Carroll, (30 years)
101 U. S. 426, 25 L. ed. 985,

Southern Pac. Co. v. Bogert (25 years)
250 U. S. 483, 63 L. ed. 1099,

Hill Exec. v. Frank,
118 Mont. 235, 165 Pac. (2) 1006,

Mott v. Iossa, (13 years after attaining majority)
(N. J. Eq.) 181 Atl. 689, at 693.

Plaintiffs' action is not defeated by alleged accounts stated as no account was stated between the parties at any time.

Defendant's answer substantially charges that because monthly statements were furnished by Ohio to plaintiff and their predecessor and payments made to plaintiffs respectively when a credit balance was shown, such rendition of statements and retention of monies resulted in an account stated each month by the plaintiffs, respectively, and

their predecessor in interest, and by reason thereof plaintiffs are estopped to maintain this action. (Defendant's Fourth Affirmative Defense, Answer, (R. 59-65).

This defense is wholly without support by the evidence. The answer admits that prior to August 5, 1925, plaintiffs made protests and objections to certain charges contained in the monthly statements. He is an express admission by defendants that objections had been made by plaintiffs to "certain charges" in the statements corroborating the testimony of Jones, Wilson, (above) to such effect. (Answer, par. IX, (R. 55, Complaint, par. XIII, (R. 13, 14).

Although the answer alleges that no objections concerning the correctness of the statements were made by plaintiffs after the correspondence between the attorneys for plaintiffs and Ohio (Firmin) the correspondence submitted with Wilson deposition (R. 546-549, and in part duplicated in plaintiffs' Exhibit "O" (R. 304-368) show many objections by plaintiffs, respectively, to correctness of statements and acknowledgment of errors by defendant and promised corrections.

An account stated is an agreement between the parties, express or implied, that all items are correct which agreement has the force of a contract. Where assent to correctness is to be implied from retention of statements, **the statements must have been retained an unreasonable** length of time **without objection.**

Baldwin v. Silver,
58 Mont. 495, 193 Pac. 750,

O'Hanlon v. Jess,
58 Mont. 417, 193 Pac. 65, 14 A. L. R. 237,

1 C. J. S. sec. 21, p. 703,

1 C. J. S. sec. 25, p. 704.

It is not an account stated if the evidence shows that the party to whom rendered objected to the correctness of the account or previous protests had gone unheeded.

1 C. J. S. 37, p. 716.

Nor is it an account stated where **the parties do not treat it as a final adjustment.**

1 C. J. S. sec. 38 p. 717

Any fact tending to negative assent to the statement of account may be shown rebut the presumption of correctness of the account by retention such as showing that the determination of the correctness of the account would be had at a later date.

1 C. J. S. sec. 37, p. 716.

To constitute an account stated each party must understand the transaction as a final adjustment of respective demands.

Daube v. United States,
289 U. S. 597, 77 L. ed. 973,

Sterns Co. vs. U. S.
291 U. S. 54, 78 L. ed. 647,

1 Am. Jur., sec. 23, p. 277.

The act that payments accompanying the statements are retained is not conclusive evidence of an account stated.

Hanson v. Fresno Jersey Dairy Co.,
(Calif. Sup. C't) 31 Pac. (2) 359,

Jensen v. Cloud,
107 Mont. 593, 88 Pac. (2) 36,

Hatter v. Interocean Oil Co.
(Okl.) 78 Pac. (2) 392, 116 A. L. R. 729,

Moore v. Bartholome Corporation,
(Cal. App.) 159 Pac. (2) 436.

In Hansen v. Fresno Jersey Dairy Co. (Calif. Sup. et.) 31 Pac. (2) 359, supra, statements showing amount claimed due were rendered monthly and checks for the amounts accompanied the statements and were retained and cashed, based on a written agreement covering a period of time. The party receiving the statements and checks claiming errors in the statements brought an action to recover monies due him on account of the errors plus certain damages. Defense of account stated interposed. The court held the facts did not constitute an account stated and said, (31 Pac. (2) 362)

"Although generally accounts are rendered by the creditor to the debtor, it is conceivable that pursuant to a relationship such as existed between these parties, accounts are expected to be rendered by the party by whom the goods are received and from whom payment is due. Moreover the contract provides for accounts to be rendered by the defendant. The theory of an account stated is that it becomes a contract between the parties for payment of the amount computed to be due without proof of the specific items included therein. Auzerias v. Naglee, 74 Cal. 50, 64, 15 P. 371. **Therefore an element essential to render the account stated is that it receive the assent of both parties, but the assent**

of both parties, but the assent of the party sought to be charged my be implied from his conduct. Crane v. Stansbury, 173 Cal. 631, 636, 637, 161 P. 7; Hendy v. March, 75 Cal. 567, 17 P. 702; Auzerias v. Naglee, supra; 1 Cor Jur. p. 685 et seq. Accordingly an account fails to become stated when the essential element of assent is lacking; and assent is not present when proper objections are made by the party sought to be charged. Klein-Simpson Co. v. Hunt, Hatch & Co., Cal. App. 625, 633, 225 p. 14. Ordinarily an account stated is an unperformed promise or agreement to pay the amount shown to be due. However, acceptance of payment of the amount shown to be due on an account rendered may render it an account stated, **but it is essential to constitute the transaction an account stated that such payment be accepted without objection. 1 Cor. Jur. 689.** There is evidence in the record that, at the time the reduction of August 1, 1930, was announced and subsequently during at least a portion of that time the defendant's statements of account and checks were received, the plaintiff personally and through the Dairymen's League, of which he was a member, protested the reduction made by the defendant as arbitrary and not in accordance with the terms of the contract." (Emphasis ours).

The Oklahoma Appellate Court in Hatter v. Interocean Oil Co. 78 Pac. (2) 392, 116 A. L. R. 729, **acceptance of monthly payments of oil proceeds and statements rendered under an oil lease but objections made** did not establish an account stated.

In Moore v. Bartholome Corporation, 159 Pac. (2) 436, statements were rendered and payments accepted over a period of years for oil royalties. Action was brought to recover the correct amount

of royalties due. Defense "account stated". The California Court held that a debt predicated upon an express contract cannot be made the basis of an account stated.

See also:

Keith, Admr. v. Rust Land & Lumber Co. (Wis. 1918) 167 N. W. 432.

The rule of the case of Van de Putte, Admr. et. al. v. Texas Pacific Coal and Oil Company, 35 Fed. Supp. 794, we believe, conclusively demonstrates defendant's plea of account stated may not be allowed. The Court held that where statements are rendered by a company over a long period and objections made thereto by the other party, the transactions do not establish an account stated.

Under the rules of the preceding authorities cited, it is necessary that in order to constitute an account stated there must be an intention to strike a balance between the parties and that the parties intend such balance to be a final settlement of the transactions to which they relate, and that any evidence tending to show that same was not intended to be such final adjustment by the parties is admissible in determining whether an account was stated by the parties.

The evidence clearly demonstrates that none of the parties intended the monthly statements as stricking a balance and treating same as final adjustments of the matter to which each statement embraced, but that such statements merely related

to continuing current unsettled accounts between the parties and the items therein were subject to changes, additions, and corrections at all times. An examination of all the original statements applicable to the operation furnished to Troy, Inland and Potlatch (Exhibits "A", "B", "C" and "D", transmitted to this Court from the trial Court and also the correspondence between the parties conclusively proves this fact. The following examples illustrate the intent and practice followed:

In the first statement rendered to Troy, September 30, 1922, drilling costs were charged on the Irving Baker Well No. 1, $1,098.92, inclusive of 8 percent interest and 10 percent overhead. This well was a free well and no charges were to be made for drilling same. In the same statement is included a charge of $84.36 against a Cora Phillips well. In the October 31, 1922 statement the same well (free well, Baker No. 1) was charged $363.63 plus interest and overhead and included a fuel charge of$189.00. In this statement Ohio corrected the charge on the Cora Phillips well for the preceding month and credited that well with $58.26. In the November 30, 1932, statement the Baker well (free well) was charged with $1,915.10 plus interest and overhead and was credited back with a correction in the sum of $6.75 on the error of the charge for fuel oil charged on the October statement against the lease. The December 31, 1922 statement charged the Baker lease (free well)

$2,245.79 plus interest and overhead, and in the January 31, 1923 statement a charge against the Baker lease (free well) of $4,992.32 plus interest and overhead, and in this statement the Baker farm was credited back $145.31 for equipment erroneously charged for pipe in the November and October, 1922 statements. In the February 23, 1923 statement Baker Farm was charged with $3,267.96 and credited with an error in charge of 1252 feet of pipe, $1,053.84, which had been charged against the lease in the previous months.

Examination of all the statements rendered to Troy shows corrections of prior statements. These statements are identified in evidence as Plaintiffs' Exhibit "C". For example, one of the additional errors corrected in the Troy statements is that Troy was charged with various amounts connected with the Baker lease, and in the May 31, 1923 statement Ohio credited Troy with over $18,000.00 as Inland's proportion of the Baker Farm expense from June 15, 1922.

Then in the months of the year 1923 to October, inclusive, the statements theretofore rendered containing charges made against the Baker No. 1 well (free well) upon the operating account between the parties were corrected by crediting to the parties the cost of that well in the current operating account.

Although the agreement and assignment were entered into June 15, 1922, no monthly statements

contained any charge for Sunhio Water plant until subsequent to May 1925, Exhibits "A", "B", "C" and letter of May 11 and May 28, 1925, (R. 334, 335) all of such expense being theretofore charged to Ohio solely and appellants had been charged monthly for water during all the prior period, conclusively establishes Ohio itself never considered the monthly statements as accounts stated between the parties, and that up to that time Ohio's understood the contract as interpreted by Jones.

Other corrections appear in entries on the majority of the above mentioned statements appearing in Plaintiffs' Exhibits "A", "B", "C". This forcibly establishes the fact that each statement rendered was not intended nor assented to by the parties as stricking a balance each month and a final agreement that the items were correct and that the balance shown was to be paid to Ohio.

The burden of proof to establish an account stated as well as the defenses of laches and statutes of limitations by a preponderance of the evidence rested upon Ohio. We respectfully submit it has failed in this respect.

Judgment in favor of plaintiffs for an accounting by defendant is warranted by the pleadings and evidence in the action.

The record in this action establishes that:

(a) Troy, Inland, Potlatch, and Ohio, during the period of operations under the Operating Agreement, were, respectively, fiduciaries;

(b) Ohio obtained properties and monies in which the parties had interests under the Operating Agreement;

(c) Ohio is charged with failure to correctly account and pay over the shares of the monies which plaintiffs claim and that demand for full final accounting therefor has been made by plaintiffs, and Ohio has failed to so account;

(d) The evidence shows generally prima facie improper charges made by Ohio, failure to give correct credit for the prevailing market price of oil at the wells, and that an accounting is proper and necessary to determine the amount owing to the plaintiffs. We refer the court to authorities pertaining to rights and obligations of fiduciaries at pages 56 to 64 ante.

Existence of any confidential or fiduciary relations is sufficient to invoke jurisdiction of equity in accounting.

Rivoli Drug Co. v. Lynch, (C.C.A. 9th, 1931) 50 Fed. (2) 536.

We respectfully submit that the judgment in favor of appellee should be reversed and the trial court be directed to order an accounting by it to appellants as to operations pertinent to the Baker lease as prayed by the appellants complaint.

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